Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

STANLEY D. BEUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I.

Whether the curative "overwhelming evidence" test of *Yates v. Evatt*, 500 U.S 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), a case involving objective physical evidence of gross violence, can be constitutionally applied to cure a burden-shifting instruction in a criminal case involving defenses based on the subjective understanding of complex substantive tax law, in light of *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991).

II.

Whether the "overwhelming evidence" test of *Yates* can be constitutionally applied to establish elements of falsity, materiality and criminal intent in a case where the taxpayer's decisions, by substantive tax law, may be made on the basis of "reasonable expectations."

III.

Whether the evidence in this case meets any applicable "overwhelming evidence" test.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REFERENCE TO THE REPORTS OF OPINIONS 1

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 4

ARGUMENT 6

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 2d 350 (1946) 15

Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968) 9

Carella v. California, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) 7, 15

Chapman v. California, 386 U.S. 18, 47 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 7, 9, 11, 13

Cheek v. United States, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) ..... *passim*

Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) 8

Dickey v. Lewis, 859 F.2d 1365 (9th Cir. 1988) 8

Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) 7

Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) 7

Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 23 (1979) 7, 8

United States v. Banks, 988 F.2d 1006 (11th Cir. 1993) 13, 15

United States v. Bishop, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973) 10, 11, 28, 29

United States v. Borque, 541 F.2d 290 (1st Cir. 1976) 9

United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Goudin, 986 F.2d 1267 (9th Cir. 1993) 15

Yates v. Evatt, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) ..... *passim*

STATUTES

26 U.S.C. § 6041(a)(a) and (c) 20

26 U.S.C. § 7206(2) 3, 4, 24, 26

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 4

28 U.S.C. § 2111 7

28 U.S.C. § 3231 4

CONSTITUTIONAL PROVISIONS

Amendment 5, Constitution of the United States ... 2, 6

Amendment 6, Constitution of the United States .. 2, 29

CODE OF FEDERAL REGULATIONS

26 C.F.R. § 1.62-1T(f) 3, 10, 13, 18, 19

26 C.F.R. § 1.274-5(e)(3) 3, 5, 13

26 C.F.R. §§ 1.6051-1(a)(1) and (2) 13, 20

26 C.F.R. § 31.3401(a)-1(b)(2) 3, 13, 19, 25

REVENUE RULING

Internal Revenue Service Revenue Ruling 55-196 ..... 5, 13, 18

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 52, Fed. R. Crim. P. 7

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REFERENCE TO THE REPORTS OF OPINIONS

The United States Court of Appeals for the Ninth Circuit unpublished Memorandum filed on April 22, 1994 (Appendix A). The unpublished Order denying the Petition for Rehearing filed on May 23, 1994 (Appendix B).

GROUNDS FOR JURISDICTION

(i) The United States Court of Appeals for the Ninth Circuit unpublished Memorandum was filed April 22, 1994.

(ii) The unpublished Order denying the petition for rehearing was filed on May 23, 1994.

(iii) Not applicable.

(iv) The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES

26 U.S.C. 7206(2).

Any person who –

. . . .

(2) Aid or assistance. – Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or documents; . . . [shall be guilty of a crime].

REGULATIONS

Treasury Regulation, 26 C.F.R. § 1.62-1T(f) (See Appendix E)

Treasury Regulation, 26 C.F.R. § 1.274.5(e)(3) (See Appendix E)

Treasury Regulation, 26 C.F.R. § 31.3401(a)-1(b). (See Appendix E)

STATEMENT OF THE CASE

This is a criminal tax case against the shareholder ("Beus") of a corporation ("Shilo") alleging Beus aided and assisted Shilo's bookkeepers in falsifying quarterly IRS Forms 941 (payroll tax reporting) for 1985, 1986 and 1987. The indictment alleged falsity in that the forms did not include payments to employees as "wages subject to withholding," which payments were treated by Shilo as expenses for which the employee was to account to IRS.

Jurisdiction of the District Court is founded on 28 U.S.C. 3231. Jurisdiction of the United States Court of Appeals for the Ninth Circuit is founded upon 28 U.S.C. 1291.

The forms accurately reported wages paid Shilo employees up to, but not exceeding 40 hours per week. For hours worked in excess of 40 hours per week, Shilo made payments to employees computed on the basis of regular rate of pay for such hours. Shilo treated those payments on its books as business expenses and accounted for the payments on the employees' pay stubs as expenses. Accordingly, Shilo did not report such payments as "wages subject to withholding" on the forms during the years 1985, 1986 and 1987.

The government indicted and proceeded to trial on the premise that the omission of these payments (termed "overtime" by the government without any reference to tax law) rendered the forms false. Because the forms were not prepared and signed by Beus, the government proceeded under the aiding and assisting theory of 26 U.S.C. § 7206(2). Beus defended at trial on the premise that the

payments fell within a then (but not now) permissible category constituting advancements made for reasonably expected business expenses; that an Internal Revenue Service Revenue Ruling[1] (and subsequently a Treasury Regulation, 26 C.F.R. § 1.62-2(d)(3)(ii)), allowed calculation of the payments to be based on "hours worked" (commissions in the Revenue Ruling); that Shilo had complied with the treasury regulation requiring Shilo to account in writing to the employee for the payment; that the then (but not now) existing treasury regulations thus placed upon the employee (not Shilo) the burden of accounting to the Internal Revenue Service for the payments[2]; and accordingly, that the payments did not constitute "wages subject to withholding" and were not subject to reporting on the forms. Beus was convicted on eight of the nine counts charged in the indictment.

At trial and on appeal, Beus contended that the District Court had improperly shifted the burden of proof to Beus to prove his conduct lawful under the tax laws. The Court of Appeals agreed that the District Court's Instruction No. 23 unconstitutionally shifted the burden of proof from the government to Beus in violation of the Due Process Clause, by requiring Beus to prove that the disputed sums were "bonafide reimbursement [ignoring advances] for travel-related [ignoring non-travel] business expenses incurred by [employees]".[3] Nevertheless,

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[1] Internal Revenue Service Rev. Rul. 55-196.

[2] Treasury Regulations, 26 C.F.R. § 1.274-5(e)(3); Appendix E.

[3] Instruction No 23, Appendix A, pp. 7-8, n. 8; Appendix C.

the Court of Appeals held the error harmless on the premise that the evidence of falsity, materiality and intent was so overwhelming that beyond a reasonable doubt the verdict would have been the same absent the constitutional error, citing *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1993).

ARGUMENT

I. INTRODUCTION

The present petition requests the Court to consider, in the context of a constitutionally forbidden jury instruction which transferred the burden of proof to the Defendant, whether the "overwhelming evidence" analysis which may support a finding of harmless error in some violent crime cases replete with purely objective, physical evidence, may properly be applied in the complexity of criminal tax cases, particularly where the governing substantive law permits taxpayer decision-making based on "reasonable expectations" of events or results to be defined *in futuro*, after the form is filed, and where there was substantial evidence to support the tax law defense. There is no reported case found applying the overwhelming evidence test to a criminal tax case to cure constitutional error occasioned by a burden-shifting jury instruction.

II. THE "OVERWHELMING EVIDENCE" ANALYSIS FOR CONCLUDING HARMLESS ERROR IN CASES DEPENDENT ON COMPLEX ISSUES OF SUBSTANTIVE TAX LAW IS SO INEFFECTUAL AS TO VIOLATE PRINCIPLES OF DUE PROCESS.

The Due Process Clause of the Fifth Amendment forbids the United States to deprive an individual of his

liberty in a criminal proceeding unless the prosecution proves each and every element of the offense charged beyond a reasonable doubt. A jury instruction which relieves the prosecution of this burden, and thus subverts the fact-finding province of the jury, violates a defendant's due process rights. *Carella v. California*, 491 U.S. 263, 265, 109 S. Ct. 2419, 2420, 105 L. Ed. 2d 218 (1989). Such an instruction, as constitutional error, is reversible error. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 23 (1979); *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

Since *Chapman v. California*, 386 U.S. 18, 47 S. Ct. 824, 17 L. Ed. 2d 705 (1967) it has been recognized that Constitutional error may nevertheless sometimes be subject to harmless error analysis under 28 U.S.C. § 2111 and Rule 52, Fed. R. Crim. P. Thus, a small body of case law, restricted in its scope and narrow in its application, has developed in a few cases by which a burden-shifting instruction may be harmless if the evidence as to the contested element is "overwhelming." *See, e.g., Yates v. Evatt, supra; Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

Virtually all those cases address harmless error as to burden shifting instructions in the context of mandatory inferences or presumptions from an objective fact drawn from physical evidence, e.g., *Sandstrom, supra*. For example, inferred or presumptive intent or malice may derive

from violent acts[4] or possession of weapons,[5] as were *Sandstrom* and *Yates* both *supra.*

These authorities, however, typically premise harmless error on such a rock-solid state of objective facts based on clear physical evidence, that the inference of intent is so self-evident that it is "overwhelming." Hence the erroneous burden-shifting instruction on such an isolated issue is said to be harmless.

Those authorities therefore are singularly inappropriate as the basis for application of the "overwhelming evidence" rule in the context of criminal cases brought under the complex Internal Revenue Code. Criminal tax cases require specific proof of knowledge of the duty imposed, and of specific intent to violate that duty by act or omission. Because of the inherent complexity of the tax laws, intent must be premised on the subjective belief and intent of the accused, precluding conviction for confusion, mistake or negligence. *Cheek v. United States, supra,* 498 U.S. at 202, 111 S. Ct. at 609-611. (1991).

Unlike cases of inferred intent from violent acts or use of weapons, tax cases are complicated by the myriad of regulations and revenue rulings governing lawfulness of conduct. Thus, each act or omission, for its effect and intent, is governed by more than simply the attendant circumstances, as might derive from use of weapons or acts of egregious violence. Each such act or omission, for

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[4] E.g., *Cunningham v. Zant,* 928 F.2d 1006 (11th Cir. 1991) (victim struck 18 times with pipe wrench).

[5] E.g., *Dickey v. Lewis,* 859 F.2d 1365 (9th Cir. 1988) (pursuit and shooting at point blank range).

its legal effect of falsity and materiality, and intent, is further controlled by the permissions or prohibitions contained in the Treasury Regulations and Revenue Rulings.[6]

In *Chapman v. California, supra,* this Court cautioned, 386 U.S. at 23, 87 S. Ct. at 827, against "overemphasis" on the notion that error is harmless if there is overwhelming evidence of guilt. Indeed, two years after *Chapman,* the Court had occasion to remind that "it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the constitution of the United States." *Bumper v. North Carolina,* 391 U.S. 543, 550 n. 16, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797 (1968). The "overwhelming evidence" analysis is therefore one to be applied with caution, and only in those cases where the required inferences, upon which guilt is found, flow implacably from facts as to which there is no doubt.

The "overwhelming evidence" analysis should not apply to cases which involve complex and disputed issues of tax law.[7] In *Cheek v. United States, supra,* this Court reaffirmed, 498 U.S. at 199-200, 111 S. Ct. at 609-10, that the complexity of tax laws required a higher standard of intentionally wrongful conduct than as with traditional rules of

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[6] In tax cases, it is the prosecution's burden to prove the duty to report information or pay tax under the applicable tax law. The accused has no burden to refute such duty; *United States v. Borque,* 541 F.2d 290, 295-96 (1st Cir. 1976).

[7] Unlike physical violence or use of weapons, the substantive requirements of tax law for the purpose of identifying wrongful acts are often the subject of interpretation, and are at least debatable if not equivocal.

criminal intent. The Court reaffirmed its decision in *United States v. Bishop*, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973) requiring for violation of the tax laws a "voluntary, intentional violation of a known legal duty." *Cheek, supra*, 498 U.S. at 201, 111 S. Ct. at 604. The prosecution is required not only to prove actual knowledge of the pertinent legal duty but also to negate a defendant's claim of subjective ignorance, misunderstanding, or contrary good faith belief, 498 U.S. at 202, 111 S. Ct. at 610-11.[8]

In the instant case, the forms could not be "false" unless the disputed payments which Shilo had recorded and treated as "business expenses," were in law required to be included on those forms. Their omission could not be a "violation of a known legal duty," unless so required to be reported. The reporting requirement turned on whether the payments, on the facts of their disbursement, could constitute either advances or reimbursement for "reasonably expected" business expenses, i.e., an expense allowance. If so qualified, then their reporting was entitled to be deferred to the end of the year and categorized as to the correct status of the funds on the employee's personal return, Treasury Regs., 26 C.F.R. § 1.62-1T(f).

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[8] The general application of the "overwhelming evidence" rule, commonly to infer intent from acts of violence or use of weapons, is of course premised on a standard of objectivity, and does not require analysis of the actual subjective intent of the Defendant. Such analysis incorporates the general premise that ignorance or mistake of law is not a defense, which the Court rejected as applicable to tax cases, *Cheek, supra*, 498 U.S. at 199, 111 S. Ct. at 609.

Any event of alleged violation of the tax laws, whether understatement of income, overstatement of deductions, or nonreporting of transactions is dependent on tax laws of similar complexity. The cautious approach to use of the "overwhelming evidence" analysis as a cure for constitutional error, which this Court heretofore announced in *Chapman, supra,* when considered in the context of *Cheek, supra,* and *Bishop, supra,* themselves requiring restraint in a rush to judgment of violation of the tax laws, makes clear that the "overwhelming evidence" analysis has no useful function in addressing harmless error in tax-related prosecutions. Indeed, it is highly questionable that given the subjective intent requirement of Cheek, the evidence can ever be overwhelming in a context of actual knowledge of the requirements of the law, or as to the absence of subjective ignorance, mistake or negligence.

The application of the "overwhelming evidence" analysis, as an objective analysis, is therefore directly in conflict with the requirement of subjective intent proof imposed by *Cheek, supra.* As so applied, an objective evidence analysis, when applied in a tax context, necessarily leaves the burden of proving subjective absence of intent with a Defendant, as exemplified by the Court of Appeal's analysis discussed *infra.* It follows that use of the "overwhelming evidence" test in a tax case continues necessarily to violate the Due Process Clause by effectively transferring the burden of proof.

Therefore, the overwhelming evidence test for intent in violent crime cases cannot be applicable to falsity, materiality and intent in the complex area of tax law. For the Court of Appeals to do so is reversible error.

III. THE "OVERWHELMING EVIDENCE" ANALYSIS FOR CONCLUDING HARMLESS ERROR MAY NOT BE CONSTITUTIONALLY APPLIED IN A CASE IN WHICH THE VALIDITY OF THE DEFENDANT'S ACTION DEPENDS UPON EVENTS OR OCCURRENCES TO BE "REASONABLY EXPECTED".

The Court of Appeals relied on *Yates v. Evatt, supra,*[9] to find the unconstitutional instruction harmless. The overriding test, however, for determining whether the

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[9] *Yates v. Evatt, supra,* involved a burden shifting instruction requiring the presumption of malice from the use of a deadly weapon. Here, the effect of the Court's instructions as to burden of proof, taken in total, required the jury to presume that the challenged payments were required to be reported under the tax laws unless the defendant proved the contrary. It is noted that the government requested, and the court gave, no instruction on the different types of payments made to employees which may or may not be required to be reported on a Form 941. Thus, the only instruction touching on the tax laws apart from the erroneous Instruction No. 23 was the instruction on general elements of the offense, Instruction No. 21 (Appendix D). The jury was there instructed that it was the government's burden to prove that the Form 941 was false as to a material matter, and specifically that the "total wages . . . subject to withholding plus other compensation did not include the amount of wages paid to the employees for overtime." Such was, in effect, the precise language of the indictment, and imported the government's theory that the payments which the government classified as "overtime" were by the nature of that characterization "wages subject to withholding." The effect of Instruction No. 21, therefore, taken in conjunction with Instruction No. 23 was to require the jury to presume the challenged payments to be subject to withholding and reporting requirements unless the defendant met his improperly imposed burden of proving the contrary.

evidence was sufficiently "overwhelming" as to constitute harmless error remains that enunciated in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 827, 828, 17 L. Ed. 2d 705 (1967), that is, "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Yates v. Evatt, supra*, 111 S. Ct. at 1892. A jury charge which unconstitutionally shifts the burden of proof can be found to be harmless error only if the charge applies to an element not at issue in the trial or if the evidence of the defendant's guilt is otherwise overwhelming, *United States v. Banks*, 988 F.2d 1006, 1111 (11th Cir. 1993).[10]

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[10] The first exception, an element "not at issue in the trial" is clearly inapplicable here. The defense below did not dispute that the payments to the employees charged to have been omitted from the Forms 941 were in fact omitted. Further, the defense did not dispute that these payments were accurately recorded in the company's books as business expenses and treated thus for purposes of reporting, payment of payroll taxes, and accounting to the employee. Neither did the defense dispute that the payments as so recorded were calculated on the basis of hours worked in excess of 40 hours per week. Rather, the defense throughout the trial was that the tax laws then existing, and specifically 26 C.F.R. §§ 31.3401(a)-1(b)(2) and 1.62-1T(f), and Revenue Ruling 55-196, when applied to the evidence produced at trial, permitted Shilo to elect to treat the payments thus made as advances of reasonably expectable business expenses. As such, under the applicable regulations, they would not be subject to reporting on the quarterly Forms 941. Rather, the employee would be required under the regulations existing then to report to IRS the receipt of those sums in gross income and justify any employer expense deductions claimed, 26 C.F.R. §§ 1.162-1T(f); 1.274-5(e)(3). Under that approach permitted by the relevant tax laws, the IRS would not be denied payment of tax lawfully due; that reporting and payment would, however, await the filing of the employee's

It remains, therefore, to address the finding of overwhelming evidence of falsity, materiality and intent made by the Court of Appeals under the principles enunciated in *Yates v. Evatt, supra.* There, Mr. Justice Souter explicated a two step approach to the analysis of harmless error in the context of "overwhelming evidence." First, the court must review and consider that evidence which the jury reasonably would have considered in determining that an essential element of the crime had been proved beyond a reasonable doubt upon the facts which were subject to the shifting of the burden of proof, *Yates v. Evatt, supra,* 500 U.S. at 404, 111 S. Ct. at 1893-1894. When the Court has thus reviewed the evidence which the jury necessarily considered, the Court must then consider whether the evidence was so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the burden shifting instruction, *id.*[11]

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personal return, Form 1040. Thus, the defense went directly to every essential element of the government's case. If the payments were not required to be reported on Form 941, their omission could not render the form "false" nor would they be "material" to a purpose of the IRS at the time the Form 941 returns were filed. Finally if a reasonable doubt existed as to whether the payments were required to be reported at all, a like reasonable doubt would necessarily exist as to the "intent" of Beus to aid and assist filing of a false return, *Cheek v. United States, supra.*

[11] The reviewing court need not consider all the evidence of record, but that which the jury necessarily would have considered and applied to the fact issues upon which the burden of proof had been shifted, *Yates, supra,* 500 U.S. at 404, 111 S. Ct. at 1894. The test is not whether the strength of the evidence on the record as a whole is sufficient that a jury *would have* found the

The Court of Appeals, in its analysis of the evidence, relied first on the premise that there was "little, if any, evidence in the record that Beus ever reimbursed his employees for *any* expenses – travel or otherwise." (Appendix A, p. 11) (Emphasis in original). That analysis is itself burden-shifting by the Court of Appeals to Beus. As the District Court did (by giving Instruction No. 23)

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elements of the offense to exist under proper instructions, but more specifically whether the jury was actually able to properly consider that evidence under the instructions of the court, *United States v. Goudin*, 986 F.2d 1267, 1272 (9th Cir. 1993) (applying *Yates*). Thus, the question is not whether the government's burden may have been met on the basis of a burden shifting instruction, but rather whether it must necessarily have been met on the same basis. *United States v. Banks*, 988 F.2d 1106, 1111, and n. 6 (11th Cir. 1993); *United States v. Goudin, supra*, 986 F.2d at 1272. Such a standard of review is required in order to assure that all elements of the crime were found by the jury, rather than by an appellate tribunal reviewing the record, *Carella v. California*, 491 U.S. 263, 268-69, 109 S. Ct. 2419, 2422, 105 L. Ed. 2d 218 (1989) (Scalia, J., concurring); *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S. Ct. 402, 406, 90 L. Ed. 2d 350 (1946); *United States v. Caldwell*, 989 F.2d 1056, 1061 (9th Cir. 1993). To properly focus the state of the evidence requiring review, it must be noted at the outset that the omission of the questioned employee payments from the Forms 941, their recording as business expenses in Shilo's records, treatment as such for purposes of payroll tax reporting, and the accounting thereof by Shilo to the employee need no review, since such were not disputed. Rather, the focus of the inquiry is necessarily upon the issue as to which the trial court transferred the burden of proof – the defense premise, applicable to all elements of the offense (falsity, materiality and intent), that the evidence established sufficient facts to justify a reasonable belief that the questioned payments were subject to elective treatment, under the tax laws existing at the time, as business expenses until such time as the employees filed their personal returns.

and the Court of Appeals acknowledged (Appendix A, p. 9), the evidence presented in support of the premise that the payments were subject to elective treatment by Shilo as expense allowances under the Treasury Regulations, *supra*, n. 10, was sufficient to both raise the affirmative defense and require a correct jury instruction. Thus, in the absence of any effective countering evidence, the government failed to meet the burden which the Court of Appeals itself recognized was imposed on the prosecution, (Appendix A, pp. 10-11), requiring acquittal of the charges.

The Court of Appeals continued to note, Appendix A, p. 8, that Shilo had "deducted the cost of gloves and tools from their [the employees'] *pay.*" (Emphasis added). The fact was, as the Court of Appeals did recognize (Appendix A, p. 8), that the costs of the expense items were deducted from the *disputed payments*, consistent with Beus' contention that the payments were a form of expense allowance permitted under the tax laws.

Thus, the Court of Appeals' analysis of the evidence presupposed the ultimate issue for its validity. If the disputed payments were in fact treatable at the employer's election under the tax laws as an expense allowance, to be accounted for at year's end on the employee's Form 1040, then there existed no impediment in either law or accounting practice to the employer's *reducing* that permitted allowance by known expenditures which the employer had incurred and which the employee, therefore, could not be "reasonably expected" to incur (again). Thus, the Court of Appeals' impression that such deductions were significant evidence of an absence of expense allowance purpose is dependent on a

predicate view that the facts did not bring the payments within the elective treatment of the regulations in the first instance. In other words, the evidence proved the point only if the ultimate fact was first assumed.

The government's evidence in this regard was lacking. The government did not present any analysis of Shilo's records for the period charged in the indictment to refute the testimony of Beus' tax expert that the detailed financial records of Shilo (admitted by the government to be "very good") reflected such items within the records as amenable to reimbursement by the elective expense allowance permitted under a reasonable interpretation of the tax laws.

The flawed reasoning of the Court of Appeals' conclusion (Appendix A, p. 9) that Beus refused to pay employees for business use of personal vehicles or for travel time is readily apparent. If the use by an employee of the employee's personal vehicle on behalf of the employer is a "reasonably expected" item of business expense for which employee reimbursement was appropriate, then an expense allowance for such reimbursement is entirely appropriate and could be so treated by the employer under the tax laws applicable in 1985, 1986, and 1987, *supra*, n. 10. It becomes inappropriate (criminal) only if, on the evidence and adequate jury instructions, the jury finds beyond a reasonable doubt that there existed no such "reasonable expectation" of the expense, such that its payment was unquestionably not for expense, and hence its non-reporting on the form necessarily "false." Again therefore, the Court of Appeals gave the refusal to reimburse for use of personal vehicles a

credence which was dependent for its merit on a presupposition that the disputed payments were *not* such reimbursement through an "expense allowance" medium, subject to final accounting and justification on the employee's Form 1040.

That a few employees may have considered the payments "overtime" (undefined by tax law or in the jury instructions) cannot control what Shilo was entitled to do by law. The ultimate character of the payments as "income" does not control their character as either "wages subject to withholding" or "expenses" at the time the payments were made. Revenue Rule 55-196. Because a factual basis existed for Shilo's elective treatment as an expense allowance, then the election for purposes of current reporting on Form 941 was Shilo's to make.

Next, the Court of Appeals found support in the conclusion that Shilo "required" employees to charge "motel and food" expenses on the company's credit card. That conclusion is simply an evidentiary *non-sequitur.* That Shilo directly paid some expenses of employees as actually incurred does not preclude the use of an expense allowance to handle other reasonably expected expenses which may be sporadic in occurrence or occur in circumstances when the credit card is not readily available. The Treasury Regulations allowed such a hybrid system. 26 C.F.R. § 1.62-1T(f).

Thus, it may be seen that the Court of Appeals' conclusion that the evidence was "overwhelming" is based in large measure on the supposition that employee expenses were not "reasonably expected" for purposes of treating the payments as an expense allowance. The facts upon which the Court relied as constituting such "overwhelming" evidence could not tend to support knowing

falsity in omission of the challenged payments from the forms unless the use of those payments for reimbursement purposes was not reasonably foreseeable when the payments were made – the very essential point which the jury was to address upon correct instructions as to the government's burden of proof, a right denied Beus.

The further fallacy of the Court of Appeals' evidentiary analysis is illustrated (Appendix A, p. 12, n. 10) by its apparent belief that falsity of the Forms 941 would be affected by business expenses reimbursed, only to the extent that such reimbursements *had actually already occurred* at the time the individual forms were filed. That conclusion completely rejects and overlooks the premise that by their nature the expenses would be *in futuro* (therefore making it impossible to be already incurred) and that 26 C.F.R. §§ 31.3401(a)-1(b)(2) and 1.62-1T(f), taken together, permitted the advancement of "reasonably expected" expenses, to be accounted for by the employee at year-end on his personal return. Accordingly, the evidence can be "overwhelming" only because the Court of Appeals assumed the impossible and also assumed the very point which gave the evidence its credence, i.e., that there was no reasonable expectation of reimbursable employee expenses.

The transfer of the burden of proof to a defendant, as the Court of Appeals did here, achieves the same result as did the constitutionally erroneous instruction. By the Court of Appeals analyzing the evidence, as did the government in the District Court, in its context of fairness to the employees and in the context of labor law, the Court of Appeals found it completely unnecessary to analyze the full text of 26 C.F.R. §§ 31.3401(a)-1(b)(2) or 1.62-1T(f), permitting the advancement of reasonably

expected expense allowances with subsequent accounting for expenditures by the employee on Form 1040.

The Court of Appeals quite clearly apprehended that unless the payments represented expenses actually incurred and reimbursed during the reported quarterly period, such payments could not qualify as business expenses; hence, any omission of reporting on Forms 941 was necessarily false. Thus, the Court's entire analytical approach was directed to the premise that the payments were not business expenses, rather than whether such were reasonably expected for expense allowance. It is inevitable that such requirement, as improperly imposed here by the Court of Appeals (that the expenses be actually incurred and reimbursed in order to justify omission from Form 941) results in falsity.[12]

On the approach taken by the Court of Appeals, the standard of review analysis required by *Yates* would not be met. On a correct instruction, the burden was on the government to prove beyond reasonable doubt that the disputed payments could not reasonably represent expected business expenses appropriate for payment by

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[12] The Court of Appeals' misapprehension of the effect of tax law on required reporting is illustrated by its perception that the non-filing of year end Forms 1099 was supportive of intentional falsity (Appendix, p. 5, n. 4). Those forms are specifically applicable to payments made to non-employees for services, i.e., independent contractors, 26 U.S.C. § 6041(a)(a) and (c); 26 C.F.R. §§ 1.6051-1(a)(1) and (2); 1.6051-2. Forms 1099 were never established as a supplementary form to "catch up" amounts paid to employees but not included on Forms W-2, also filed at year end.

expense allowance,[13] hence, were required to be included as "wages . . . subject to withholding" on the forms. Although the Court of Appeals cursorily reviewed "that evidence which the jury reasonably would have considered", the Court also, as noted above, did so without reference to the effect of tax law. Its analysis, therefore, effectively left the burden, as in the District Court, with Beus to prove that his actions were within applicable tax law at least to the extent of a reasonable doubt, directly inconsistent with the Court of Appeals' conclusion that the District Court had erroneously placed the burden on him.

It follows, therefore, that the Court of Appeals did not and could not follow the second requirement of *Yates*, i.e., to consider whether the evidence was so overwhelming that the verdict would have been the same absent the burden shifting instruction. The Court could not so analyze the evidence because it adopted a view of the evidence which rendered the relevant tax regulations inapplicable to the case, hence could not consider the evidence in the light of the government having the burden to *prove* the regulations inapplicable on the facts.

In applying the analysis required by *Yates*, the evidence that the jury necessarily would have considered on the reasonable expectancy of employer business expenses

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[13] The Court of Appeals appeared to consider, as did the District Court, that the expenses must have been actually incurred and the subject of current reimbursement in order to justify exclusion from quarterly Forms 941. Compare Appendix A, pp. 8-9, 11-12, and the District Court's Instruction No. 23, *id.* at n. 8.

being incurred by employee and resultant non-reporting on Forms 941 was:

a. Shilo paid the majority of its business expenses to the suppliers of goods or services, by direct payment in the form of company check or credit card.

b. Shilo's records demonstrated other items of business expense not directly paid by Shilo which could be the subject of a business expense allowance permitted under the tax laws.

c. No evidence was presented by the government as to the scope or extent of those items which could be the subject of employment reimbursement by an expense allowance.

d. Beus had instructed the bookkeepers to prepare Forms 941 "as in the past".

e. The government offered no evidence of "past" practices which would establish Beus' knowledge or intent.

f. Beus offered evidence that prior to the tax quarters charged in the indictment, the practice had been to include the disputed payments in the Form 941 reporting.

g. Beus, in discussions with employees, made statements to the effect that he was willing to "take the chance" of audit, or that he would "get caught" if Forms 1099 were filed.[14]

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[14] An acknowledgement of the risk of civil audit, of course, or of civil tax deficiency findings, is not [as the Court of Appeals

h. Beus had little or no background in bookkeeping or tax matters; company records were maintained by his wife or employed bookkeepers, and the company engaged a Certified Public Accountant to consult on accounting and tax matters.

i. Beus instructed his bookkeeper to not file "supplemental" Forms 1099 at year-end, and declined to provide such forms to employees.[15]

j. Shilo separately accounted for the payments as required by the applicable regulations.

Given this factual review, the fallacy of the approach taken by the Court of Appeals becomes evident. The threshold question of whether the disputed payments could represent an allowance for "reasonably expected" business expenses had been raised sufficiently to require, as the Court of Appeals acknowledged, an instruction on the defense theory, and thus place the burden of proof on the prosecution to disprove the defense beyond a reasonable doubt.

Evaluating the evidence for the purpose of the second prong of the *Yates* approach, i.e., whether the evidence was so overwhelming that the result would have been the same with the burden properly placed on the government, required the Court of Appeals to consider:

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evidently perceived, (Appendix, p. 5)] tantamount to an admission of criminal wilfulness.

[15] Form 1099 had no relationship to reporting of funds paid to employees, *supra*, p. 20, n. 12.

a. That the presumption of innocence alone required, as a beginning, a consideration that the disputed payments were within the exemption provisions of 26 C.F.R. § 31.3401(a)-1(b)(2) as "reasonably expected" business expenses through the elective permission to so "treat" them, provided by 26 C.F.R. § 1.62-1T(f).

b. That if reasonable doubt existed as to whether the payments were thus exempted, then their omission from Forms 941could be neither false, material or intentional within 26 U.S.C. § 7206(2).

c. Even if the payments were beyond reasonable doubt *not* so exempted, Beus knew beyond reasonable doubt of his duty to report them, and his direction to omit them was with specific intent, and not by reason of confusion, mistake or negligence.

Yates, supra, 111 S. Ct. at 1893-94.

This analysis could not, of course, be conducted *in vacuo* of either the tax laws themselves or of the prosecution's burden. To properly analyze the character of the evidence as "overwhelming" under *Yates,* the Court of Appeals was required to address first whether the premise that expenses were "reasonably expected" was "overwhelmingly" negated by the evidence. It did so, as did the prosecution and the District Court, on the premise that the expenses were required to have been actually incurred and reimbursed, without consideration of the express language by which expenses could be "advanced" if "reasonably expected", and payments could be "treated" as either reportable wages or as expenses exempt from reporting on the 941 Forms.

Its analysis was therefore self-defeating. By considering first that the payments were "overtime" or "pay", and that the absence of proof of direct reimbursement of actually incurred expenses was dispositive and "overwhelming" proof that there could not be "reasonably expected" expense for which the employee might be given an allowance, to be accounted separately on his personal return, the Court of Appeals effectively and improperly left the burden of proof with Beus.

The regulatory basis for payment of expense allowances to employees, subject to subsequent justification and accounting either by the employer or the employee is dependent on whether those expenses are "reasonably expected." The reasonable expectation is, by definition, to be made within the context of the business conducted, and subject to judgment decision which may or may not *in futuro* be found to be accurate. Accordingly, the determination of "reasonably expected" business expenses exempted from the Form 941 reporting requirements, and classified as "not wages . . . subject to withholding," 26 C.F.R. § 31.3401(a)-1(b) are not a matter subject to objective determination at the time the decisions are made.

Because the actual expenditure of the funds or the accounting therefor were not required by applicable regulations to be accomplished by the date of filing of the quarterly Forms 941, the duty to report the disputed payments could not be determined on the basis of objective facts existing at the time of filing, but rather was a matter of subjective judgment of the employer pending final accounting. Accordingly, the duty to report the disputed payments at all was dependent upon subjective

business judgment made by the employer at the time the payments were made, and which judgments were not subject to objective analysis until a point not required by law until after the forms were filed.

The imposition of criminal sanction based on a "overwhelming evidence" analysis of matters by which the duty to report remained in the subjective judgment of the employer at the time the returns were filed offends due process by transferring to the Defendant the burden of proving that such subjective judgment was a reasonable interpretation of the substantive tax law under the circumstances.

IV. THE "OVERWHELMING EVIDENCE" ANALYSIS IS VIOLATIVE OF PRINCIPLES OF DUE PROCESS IN THE CONTEXT OF THE PRESENT CASE.

Assuming, *arguendo,* that there may be some cases within the sphere of tax prosecutions by which the alleged criminal act, knowledge of legal duty, and intentional violation of that duty may be subject to the "overwhelming evidence" analysis, such a result may not obtain in the posture of this case.[16]

In the instant case, Beus' alleged wrongful act was premised on 26 U.S.C. § 7206(2), upon the allegation that he aided or assisted the preparation of false returns, and otherwise gave oral instruction resulting in avoidance of subsequent corrective reporting. On this theory of the

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[16] Much of the foregoing discussion in Part III is also applicable here, but will not be repeated.

prosecution's case, there could be no *actus reus* unless the tax laws literally required the reporting of the disputed payments.

The prosecution presented no analysis of either the actual business expenses incurred by or on behalf of employees, or of expenses which might be "reasonably expected" in the ongoing course of Shilo's business, for the purpose of demonstrating that Beus' application of the regulations was subjectively unreasonable. Thus, the government's evidence established only that some business expenses not otherwise directly paid to suppliers, and not otherwise directly reimbursed to employees, were reflected in Shilo's records. Since Shilo's duty to report the disputed payments was therefore not established as objective fact, Beus' subjective knowledge could not be inferred from those facts.

In summary, this evidence was "overwhelming", if at all, only to the factual conclusion that Beus intended to keep doing as he had done. It addressed no actual knowledge of a duty to report these payments, but at most a potential disagreement by IRS with an evident belief that the payments need not be reported. Absent such "overwhelming evidence" of a knowledge of duty, the evidence of an intentional violation of such known legal duty, *Cheek, supra,* could not logically follow.

Accordingly, and as a matter of law, the evidence was not sufficient to meet a standard of "overwhelming" evidence sufficient to cure the due process violation occasioned by the transfer of burden of proof acknowledged by the Court of Appeals.

V. CONCLUSION

The burden of proof in a criminal tax case is on the prosecution. An instruction to the jury that shifts that burden of proof from the prosecution to the Defendant is unconstitutional and reversible error.

The few, non-tax, cases that carve out a narrow exception deal with violent crimes where intent is self-evident from clear, physical evidence (18 blows with a pipe wrench). There should be no harmless error exception based on "overwhelming evidence" in a substantive tax law case, due to the extremely subjective nature of individual comprehension of the complex tax laws.

In this particular case the overwhelming evidence test should never apply because the regulations deal with an extremely loose, subjective rule, that is, what is "reasonable" in the way of expectations on the part of the employer under ever varying circumstances.

Furthermore in this case, there was such substantial evidence that Beus' conduct was appropriate, that both the District Court and the Court of Appeals agreed that the burden of proof was on the government to negate that defense theory and that an instruction to the jury was necessary to place that specific burden for this particular issue on the government. It is inconsistent then, in this entire context, to find the existence of "overwhelming evidence" of falsity, materiality and intent.

Expansion of the "overwhelming evidence" rule to criminal tax trials, under the analytical process announced in *Yates, supra,* directly conflicts with the requirement imposed by *Cheek, supra,* and *Bishop, supra,*

that a jury find actual knowledge of the duty imposed, and a specific intent to violate that duty which is unmitigated by subjective belief, error or good faith misunderstanding. The instant ruling of the Court of Appeals, upon the analysis there provided, would in a criminal tax case submit the determination of intent to an objective standard for its evaluation. Erosion of the constitutional due process by burden shifting jury instructions through extension of *Yates* to a criminal tax case runs head on into *Cheek* and *Bishop*, resulting in the Sixth Amendment collision that Mr. Justice Scalia recognized in *Yates, supra*, 500 U.S. at 414.

For the reasons stated the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

A. April 22, 1994 unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit .....App. 1

B. May 23, 1994 unpublished Order of the Court of Appeals denying rehearing .....App. 13

C. Jury Instruction No. 21 .....App. 14

D. Jury Instruction No. 23 .....App. 15

E. Treasury Regulations .....App. 16

26 C.F.R. 1.62-1T(f) .....App. 16

26 C.F.R. 1.274-5(e)(3).....App. 17

26 C.F.R. 31.3401(a)-1(b) .....App. 18

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STANLEY D. BEUS, Defendant-Appellant.	No. 93-30256 D.C. No. CR-92-11-1-HLR **MEMORANDUM*** (Filed Apr. 22, 1994)

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted April 4, 1994
Seattle, Washington

Before: WRIGHT, TANG, and REINHARDT, Circuit Judges.

I. INTRODUCTION

Appellant Stanley D. Beus ("Beus") appeals his criminal conviction under 26 U.S.C. § 7206(2) for eight counts of aiding or advising in the preparation of fraudulent or false tax documents. We affirm the judgment of the district court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

II. BACKGROUND

In 1981, appellant Stanley D. Beus ("Beus") formed Shilo Automatic Sprinkler, Inc. ("Shilo"), a closely held corporation located in Nampa, Idaho. Shilo was in the business of installing fire sprinkler systems in commercial buildings across the western United States.

Between 1985 and 1987, Shilo filed quarterly income tax returns with the Internal Revenue Service ("IRS"). The returns were filed on Form 941, which requires employers to report all wages paid to its employees and all taxes that are withheld from those wages. The returns failed to show any overtime that was paid to Shilo's employees.

In reality, Shilo's employees were paid for their overtime "under the table" at straight rates. The overtime amounts were recorded in Shilo's books not as "wages," but as reimbursements for "expenses," which are not subject to any tax withholding. In essence, Shilo's employees obtained their overtime amounts tax-free, and Shilo did not have to pay to the IRS the amounts that should have been withheld.

On September 18, 1987, the IRS notified Beus that Shilo was the subject of a routine audit. On October 12, 1987, Shilo began properly accounting for the overtime amounts on its Form 941 returns.

III. PROCEEDINGS BELOW

In 1992, Beus was indicted on nine counts of aiding or advising in the filing of a false Form 941 – an employer's quarterly tax return – in violation of 26 U.S.C.

§ 7206(2). Each count represented a false Form 941 that had been filed by Shilo between the last quarter of 1985 and the last quarter of 1987.

The trial commenced on April 5, 1993. At the conclusion of the evidence, the district court dismissed count nine.[1] The jury found Beus guilty of the remaining eight counts. On June 28, 1993, Beus was sentenced to four months imprisonment, a $10,000.00 fine, one year of supervised release, and $11,958.92 in costs for prosecution, incarceration, and supervision.

IV. ANALYSIS

A. Sufficiency of the Evidence

First, Beus argues that the evidence presented at trial was insufficient to sustain the jury's guilty verdict. We disagree.

Here, the government presented sufficient evidence such that a reasonable jury could have found Beus guilty beyond a reasonable doubt of violating each element of 26 U.S.C. § 7206(2) ("Section 7206(2)").[2]

1. The Form 941s Were False as to a Material Matter.

The government's evidence was sufficient to prove beyond a reasonable doubt that the Form 941s were false

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[1] The court found that the alleged fraud in count nine was due to a mistake on the part of Shilo's bookkeeper and not due to Beus.

[2] Under Section 7206(2), the government must show that (i) the defendant willfully aided or assisted in the preparation of any document arising under the internal revenue laws and that (ii) the document is fraudulent or false as to any material matter.

as to a material matter – i.e., line two of those returns[3] failed to report the overtime that was paid to Shilo's employees.

The government introduced testimony by Robert D. Hanson, a revenue agent with the IRS for 32 years. Using the company's time records, Agent Hanson entered the total amount of hours worked by each employee per week into a computer program. The program showed that the amounts reported on line two of Shilo's Form 941s only accounted for each employee's first 40 hours, and did *not* account for any overtime worked. In virtually every case, the computer-calculated overtime amount matched *precisely* what Shilo's bookkeeping system had labeled "expenses."

2. Beus Willfully Aided or Advised in the Preparation of Form 941. The government's evidence was also sufficient to prove beyond a reasonable doubt that Beus had willfully aided or advised in the preparation of Shilo's Form 941s.

The government first introduced evidence by Theresa Holsclaw, Shilo's secretary and bookkeeper between 1984 and 1987. Holsclaw testified that, shortly after starting her job, she told Beus that his "procedure" for accounting overtime was incorrect. She warned him that it might trigger an IRS audit. Beus replied that "he was willing to take that chance" and instructed her to continue with the procedure.

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[3] Line two states: "Total wages and tips subject to withholding, plus other compensation."

At the end of each year, Holsclaw would ask Beus whether she could issue a 1099 statement[4] for Shilo's employees because the overtime did not appear on their W-2 statements. Beus refused. He told her that the IRS might get "suspicious" if Shilo's regular employees all had 1099 statements. Beus also told her that if such statements were issued, the sum of his employees' income would not match the amounts stated on Shilo's Form 941 returns. One year, Holsclaw actually prepared the 1099 statements for Shilo's employees, but Beus told her to throw them away.

The government next introduced evidence by Amy Reed, who replaced Holsclaw as bookkeeper in 1987. Holsclaw told Reed how Beus wanted overtime to be recorded. Like Holsclaw, Reed approached Beus and asked him several times whether the overtime should be reported on Shilos' [sic] Form 941 returns. Beus assured Reed that overtime should continue to be recorded as "expenses."

The government finally introduced evidence by Michael Johnson, a Shilo employee between 1984 and 1987. At the end of each year, Johnson would ask Beus to include his overtime on his W-2 statement or to issue him a 1099 statement. Beus refused and told Johnson that "if he showed [the overtime] on the W-2, he would be caught."

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[4] This statement accounts for the difference between the actual wages paid to an employee and the amount indicated on his W-2 statement.

B. Modification of Jury Instructions by Limiting Type of Expenses

Second, Beus argues that the trial court erred in modifying his proposed jury instruction so as to limit it to travel and travel-related expenses. We disagree.

1. Background. On the morning that the jury was supposed to be instructed, Beus submitted a proposed instruction that asked the jury to determine, as a threshold issue, whether the disputed overtime amounts were in fact "expense allowances."[5] Beus claimed that his instruction was based upon Treas. Reg. §§ 31.3401(a)-1(b)(2), which stated

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[5] The proposed instruction stated:

In your consideration of what is or is not overtime, you are instructed that in the years 1985, 1986, and 1987, if an employer, such as Shilo, chose to pay money for subsistence, computed on a basis similar to that used in computing the employee's hourly wage, and identified payments to employees as an *expense allowance*, it was the employee's responsibility to report the payments on his or her tax return as income from employment, and to substantiate any related business expenses incurred by the employee and claimed as deductions from that income. Prior to 1989 the employer was not required to withhold or pay employment taxes on payments to employees identified as an expense allowance, or to report the amounts so paid as wages subject to withholding on line 2 of Form 941. The amount of the expense item could be computed on a basis similar to that used for computing the employees' wages, for example, the number of hours worked.

Therefore, the Government must prove beyond a reasonable doubt that the expense money paid to employees was not such an *expense allowance*.

that an employer was not required to withhold taxes on certain "traveling and other expenses."[6]

The court agreed to offer the instruction despite the fact that it was untimely. However, among other things, the court narrowed the phrase "expense allowances" to "travel and travel-related business expenses."[7] The court stated that "[n]o reference was made to other types of business expenses because the court *simply could not justify* instructing the jury that they could find that the disputed sums were advancements or reimbursements for expenses other than travel related expenses. *No evidence had been offered which would support such a claim.*"[8]

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[6] The regulation states:

(2) *Traveling and other expenses.* Amounts paid specifically – either as advances or reimbursements – for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding.

[7] The court modified the wording because it found that the instruction was confusing and did not conform to the evidence presented at trial.

[8] The modified instruction was as follows:

Instruction No. 23. The Defendant has presented evidence that the disputed sums at issue in this case were paid to employees as reimbursement for *travel and travel-related business expenses* incurred or to be incurred by them in the course of their employment with Shilo Automatic Sprinklers, Inc. Therefore, as part of your deliberations you must decide whether the disputed sums were in fact paid as bona fide travel expenses or as overtime wages as the Government alleges.

If you find that the disputed sums were – excuse me – if you find that the disputed sums were paid to the employees as bona fide reimbursement for travel-related business expenses incurred by

2. Discussion. We conclude that the district court did not abuse its discretion in narrowing the phrase "expense allowances" to "travel and travel-related business expenses." Our review of the trial transcript confirms the district court's finding that there was simply no evidence that Beus reimbursed his employees for *non*-travel expenses.

Beus first argues that his employees were required to incur non-travel expenses for gloves and other equipment. However, Beus' argument fails because the testimony clearly shows that he never reimbursed his employees for such expenses. The cost of such gloves and equipment was *deducted* from each employee's "expense" records. (That is, Beus bought the equipment for his employees and then *charged* them for it.) If Beus had reimbursed his employees for such amounts, the cost of the equipment would have been *added* to each employee's "expense" records.

Beus next argues that some Shilo employees used their personal vehicles for company business. However, an employee who was questioned about the use of his personal vehicle for company business expressly denied that Beus ever reimbursed him for such use. This testimony was uncontradicted.

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them, you must enter a verdict of not guilty on all counts against the Defendant.

If you find that the disputed sums were in fact paid to the employees as wages for overtime hours worked by them under the pretense of expenses, *you must proceed in your deliberations.* You must address each count separately, bearing in mind the elements which the Government must prove beyond a reasonable doubt which are set forth in Instruction No. 21.

In fact, there is little evidence that Beus reimbursed his employees for *anything*. All subsistence expenses (e.g., food and lodging) incurred by Shilo employees while traveling away from home were made *directly* on a Shilo company credit card. Not only did Beus refuse to pay them time-and-a-half for their overtime, but he refused to pay them for their travel time and their expenses on their way to remote job sites.[9]

C. Shifting Burden of Proof

Third, Beus argues that the district court improperly shifted the burden of proof away from the government and therefore violated the Due Process Clause. We agree in part, but find the error harmless.

1. Background. Beus originally asked the court to instruct the jury that the government had the burden of proving beyond a reasonable doubt that the disputed sums were not expense allowances. *See supra* p. 6 n.5. The court refused to do so. The court simply instructed the jury that it was required to determine whether the disputed sums were "bona fide reimbursement for travel-related business expenses incurred by [employees]." *See supra* p. 7 n.8. The court separated this question from the others before the jury and appeared to treat it as a threshold issue. As a result, the court failed to advise the jury that this question, like all others, was subject to the

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[9] During trial, Beus also introduced testimony from an expert who described the various kinds of expenses for which an employee *might* be reimbursed by his employer. However, the expert never testified that Beus *in fact* made such reimbursements to his employees.

government's obligation to establish its case beyond a reasonable doubt. *Id.*

2. Discussion. We conclude that the court's failure to explain to the jury the nature of the government's obligation with respect to the expense reimbursement question violated the Due Process Clause. Nevertheless, we find the court's error to be harmless.

(a) Constitutional Error. Under Ninth Circuit law, after a criminal defendant raises an affirmative defense, "the government must disprove every element of the affirmative defense beyond a reasonable doubt." *United States v. Gonsalves,* 675 F.2d 1050, 1054 (9th Cir.), *cert. denied,* 459 U.S. 837 (1982).

Here, Beus raised the affirmative defense that the disputed sums were "expense allowances," which he did not have to report under Treas. Reg. § 31.3401(a)-1(b)(2). Under *Gonsalves,* such a defense required the government to prove beyond a reasonable doubt that the sums were not expense allowances.

In rejecting this part of Beus' proposed jury instruction and giving the instruction in the context in which it was given, the district court failed to explain the government's obligation to disprove the affirmative defense beyond a reasonable doubt – i.e., the jury might have thought that a lesser standard was applicable to the question whether the disputed sums were not "expense allowances."

(b) Harmless Error Analysis. However, the district court's constitutional error is subject to harmless-error

analysis. *See Rose v. Clark*, 478 U.S. 570, 580 (1986) (holding that a jury instruction that "impermissibly shifted the burden of proof" can nevertheless constitute harmless error under *Chapman v. California*).

The Supreme Court has held that the proper inquiry is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Id.* at 583 (internal quotes omitted). Put differently, the reviewing court must determine whether "the force of the evidence . . . *is so overwhelming* as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [constitutional error]." *Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991) (emphasis added).

Here, our review of the trial record shows that the district court's error is harmless beyond a reasonable doubt. Even had the court properly advised the jury of the government's burden of proof, the force of the evidence on the "expense allowance" issue is so "overwhelming" that the verdict would unquestionably have been the same in this case.

There is little if any evidence in the record that Beus ever reimbursed his employees for *any* expenses – travel or otherwise. The uncontested testimony of Shilo employees showed that Beus (i) deducted the cost of gloves and tools from their pay, (ii) refused to reimburse them for the business use of their personal vehicles, (iii) refused to pay them for their travel time, and (iv) required them to charge all motel and food expenses directly on the Shilo credit card. *See supra* pp. 7-8. On cross-examination, Beus himself *admitted* that travel

expenses were ordinarily charged on the company credit card, that such expenses were paid for by Shilo, and that his employees never received any per diem or standard allowances.[10]

Based on the overwhelming force of the evidence, the jury had no choice but to conclude that, even under the strictest possible standard, the disputed amounts were *not* "expense allowances." Accordingly, the district court's error on this issue was harmless beyond a reasonable doubt.[11]

V. CONCLUSION

The judgment of the district court is accordingly

AFFIRMED.

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[10] Even if some payments had been for travel expenses, the result would not be different. All that would change would be that some of the *amounts* involved in the failure-to-report charges would be slightly less than suggested at trial. The underlying criminal act would remain unchanged.

[11] Beus also argues that the district court's instructions automatically "directed a verdict" for the government. To the contrary, the instruction was merely a threshold determination that allowed Beus a chance for acquittal. The jury was explicitly told that it could not convict Beus unless it *also* found that the government had met its burden of proof for *each* element of Section 7206(2). *See supra* p. 7 n.8.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, v. STANLEY D. BEUS, Defendant-Appellant.	)	No. 93-30256 D.C. No. CR-92-11-1-HLR ORDER (Filed May 23, 1994)

Before: WRIGHT, TANG, and REINHARDT, Circuit Judges.

Appellant's petition for rehearing is denied.

APPENDIX C

Instruction No. 21. The Defendant is charged in the indictment with eight counts of aiding or advising the preparation of false tax documents in violation of Section 7206(2) of Title 26, United States Code. In order for the Defendant to be found guilty on a particular count, the Government must prove each of the following elements beyond a reasonable doubt with respect to that count.

First, that the Defendant willfully assisted or aided in the preparation of a employer's quarterly federal tax return Form 941 that was fraudulent or false. And second, the Form 941 was fraudulent or false as to a material matter; specifically, that the total wages and tips subject to withholding plus other compensation portion of the Form 941 failed to include the amount of wages paid to employees for overtime.

A person acts willfully by voluntarily and/or intentionally assisting or advising another to do something that the person knows disobeys or disregards the law. A person does not act willfully if a person acts as result of a good faith misunderstanding of the requirements of the law. Because the Government must prove that the Defendant acted willfully, a mere showing of recklessness or negligence on the part of the Defendant will not be sufficient to a verdict of guilty in this case.

APPENDIX D

Instruction No. 23. The Defendant has presented evidence that the disputed sums at issue in this case were paid to employees as reimbursement for travel and travel-related business expenses incurred or to be incurred by them in the course of their employment with Shilo Automatic Sprinklers, Inc. Therefore, as part of your deliberations you must decide whether the disputed sums were in fact paid as bona fide travel expenses or as overtime wages as the government alleges.

If you find that the disputed sums were – excuse me – if you find that the disputed sums were paid to the employees as bona fide reimbursement for travel-related business expenses incurred by them, you must enter a verdict of not guilty on all counts against the Defendant.

If you find that the disputed sums were in fact paid to the employees as wages for overtime hours worked by them under the pretense of expenses, you must proceed in your deliberations. You must address each count separately, bearing in mind the elements which the Government must prove beyond a reasonable doubt which are set forth in Instruction No. 21.

APPENDIX E

Treasury Regulations, 26 C.F.R. § 1.62-1T (f)

(f) Reimbursement or other expense allowance arrangement. This paragraph (f) applies to expenses paid or incurred in taxable years beginning before January 1, 1989. For purpose of this section, the phrase "reimbursement or other expense allowance arrangement" means advances, allowances (including per diem allowances and mileage allowances), or reimbursements received by a taxpayer for business expenses that are allowable as deductions by part VI and paid or incurred by the taxpayer in connection with the performance of services by him or her as an employee under a reimbursement or other expense allowance arrangement with the employer (whether the reimbursement is actually received from the employer, its agent, or a third party for whom the employee performs a benefit as an employee of the employer), as well as amounts charged directly or indirectly to the employer through credit card systems or otherwise. In addition, the reimbursement or other expense allowance arrangement must be identified either by making a separate payment or by specifically indicating the separate amount if both wages and the reimbursement or expense allowance are combined in a single payment. It shall be presumed that any amounts treated as compensation to an employee by an employer on the employer's return of tax under chapter 1 of the Code and as wages to such employee for purposes of chapter 24 of the Code (relating to withholding of income tax at source on wages) do not constitute reimbursements or other expense allowances for

purpose of section 62 and this section. This presumption may be rebutted by clear and convincing evidence to the contrary that includes evidence of an obligation by the employee to make an adequate accounting (as defined in § 1.274-5(e)(4)) to the employer for the employee's business expenses.

Treasury Regulations, 26 C.F.R. § 1.274-5(e)

. . . .

(3) *Reporting of expenses for which the employee is not required to make an adequate accounting to his employer.* If the employee is not required to make an adequate accounting to his employer for his business expenses or, though required, fails to make an adequate accounting to his employer for his business expenses or, though required, fails to make an adequate accounting for such expenses, he must submit, as a part of his tax return, a statement showing the following information:

(i) The total of all amounts received as advances or reimbursements from his employer, including amounts charged directly or indirectly to the employer through credit cards or otherwise; and

(ii) The nature of his occupation, the number of days away from home on business, and the total amount of business expenses paid or incurred by him (including those charged directly or indirectly to the employer through credit cards or otherwise) broken down into such categories as transportation, meals and lodging while away from home overnight, entertainment, gifts, and other business expenses.

In addition, he must maintain such records and supporting evidence as will substantiate each element of an expenditure (described in paragraph (b) of this section) in accordance with paragraph (c) of this section.

Treasury Regulations, 26 C.F.R. § 31.3401(a)-1(b)

. . . .

(2) Traveling and other expenses. Amounts paid specifically – either as advances or reimbursements – for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.